

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 17**

Topeka, Kansas

WESTAR ENERGY, INC.

Employer

and

Case 17-RC-12684

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 304, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on October 28, 2010, before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether the petitioned for unit of Transmission/Distribution Contract Inspectors employed by the Employer constitutes an appropriate unit for the purpose of collective bargaining. At the close of the hearing, the parties were afforded the opportunity to file briefs addressing the issues raised during the hearing.¹

¹ Upon review of the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed;
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. Commerce facts: Westar Energy, Inc. is a State of Kansas corporation engaged in the business of providing public utility services from its facility located at 818 S. Kansas Avenues, Topeka, Kansas 66612, the only facility involved herein. During the past calendar year, a representative period, the Employer in the course and conduct of its business operations annually purchased and received goods and services valued in excess of \$50,000 directly from sources located outside the State of Kansas. During the same period, the Employer sold and shipped goods and services valued in excess of \$50,000 directly to customers located outside the State of Kansas. The Employer has annual gross income revenue in excess of \$500,000.
- c. The labor organization involved claims to represent certain employees of the Employer; and
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

I. DECISION

For the reasons discussed in detail below, I conclude that the Employer has not met its burden of establishing that the Technical Specialist-Construction Inspectors² are managerial employees. Additionally, I conclude that directing an election in this matter will not create a conflict of interest for the Technical Specialist-Construction Inspectors. Finally, to the extent that the Petitioner appears to seek an *Armour-Globe* election to add the Technical Specialist-Construction Inspectors to the existing bargaining unit of the Employer's employees represented by the Petitioner, I conclude that the Technical Specialist-Construction Inspectors lack a sufficient community of interest to support such an election.

Accordingly, the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and part-time Technical Specialist-Construction Inspectors located at 818 Kansas Ave., Topeka, Kansas, excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

There are currently two employees in the bargaining unit found appropriate herein.

II. ISSUES

The Petitioner seeks an election in the unit of Technical Specialist-Construction Inspectors (Inspectors) located at 818 Kansas Ave., Topeka, Kansas. The Employer contends that the petitioned-for unit is inappropriate for the three reasons: (1) the Inspectors are managerial employees who are excluded from the Act's coverage; (2) the Inspectors are responsible for overseeing the work of employees employed by the Employer's outside contractors and those employees are presently represented by the Petitioner, which would cause a conflict of interest if the Inspectors were also represented by the Petitioner; and (3) the

² The petitioned-for employees will be identified by the title used to reference them during the hearing as opposed to the title included in the Petition.

Inspectors do not share a sufficient community of interest with the existing unit of employees presently represented by the Petitioner to merit an *Armour-Globe* election .

III. FACTS

A. Employer's Operations and Bargaining History

The Employer, a Kansas corporation, is a public utility provider that was formed in 1992 by the merger of Kansas Power and Light Company (KPL) and Kansas Gas and Electric Company (KGE). The Employer's business includes generating electricity at power plants, transmitting the electricity to substations, and distributing electricity to customers throughout Kansas.

The Employer's Transmission Department is responsible for the construction and maintenance of transmission lines that transmit electricity to customers' homes and businesses. Nearly all of the construction undertaken by the Transmission Department is performed by outside contractors. The outside contractors include line construction crews, surveyors, foundation contractors, fence and gate construction crews, and street clearers, who, although not employed by the Employer, are required to meet the Employer's specifications and adhere to its safety standards. Many of the outside contractors' employees presently are represented by the Petitioner.

Of the Employer's 2400 employees, approximately 1300 employees are covered by a current collective-bargaining agreement that is jointly administered by the Petitioner and IBEW Local 1523, with the Petitioner having been the historical collective-bargaining representative of the former KPL employees and IBEW Local 1523 having been the historical collective-bargaining representative of the former KGE employees. The bargaining unit is defined by job classification and geographic location, and the record establishes that it includes the following

broad classifications: electrical employees, mechanical employees, operations employees, and utilities clerks in the Employer's power plants; linemen and trouble-shooters in the electric line departments; distribution designers; storekeepers and storeroom attendants; electric system operators and utility clerks; and voice data technology employees.³

B. Technical Specialist-Construction Inspector

The Employer currently employs two Technical Specialist-Construction Inspectors (Inspectors). The Inspectors work under the direction of Manager of Transmission Maintenance Gerald Lorimer, are compensated on an hourly basis, and receive overtime pay. Inspectors work independently and have little, if any, interaction with the Employer's employees currently represented by the Petitioner.

Long-term employees Eric Lewis and Kenneth Spreer are the incumbent Inspectors. Lewis began his 23-year career with the Employer as a member of a survey crew before becoming an Inspector in 1992. Spreer, who has been an Inspector for approximately two years, previously worked for the Employer as a field crew operator, meter reader, and journeyman lineman.

The record reveals that the Inspector position has been in existence for at least forty years. Although the Employer has dramatically increased the number of projects it has undertaken in recent years, the Inspectors' responsibilities have not changed appreciably over the years. The Inspector position has never been represented by a union, and there is no evidence that the Employer and the Petitioner have discussed including the position in the existing bargaining unit.

A significant portion of the Inspectors' responsibilities include overseeing outside contractors to ensure that the contractors' employees adhere to the Employer's safety rules and meet all of the Employer's contract specifications. Inspectors work without a predetermined schedule and

³ The record failed to explain whether the Petitioner and IBEW Local 1523 divide their representational duties along jurisdictional lines.

are independently responsible for determining the daily priorities on the transmission projects that they oversee. Typically, Inspectors serve as the Employer's only field representative on the Employer's multi-million dollar projects. The current Inspector job description lists the required skills, knowledge and abilities as follows:

With minimal supervision, this position is responsible for the installation inspection of concrete foundations, steel structures, wood structures, conductors and fiber optic wire and other areas of transmission line construction. Successful candidate will be responsible for ensuring that work is done safely and in accordance with all specifications. Regular duties include indirect supervisor of contractors in the field that include tree clearers, surveyors, foundation and line contractors. Must be able to interface with various groups within the company including Real Property, Engineering, Materials Management, Transmission Operations and Distribution Operations. Direct contact with customers at their location and work schedule will be required periodically. Performance goals for this position include safety, customer service, teamwork, innovation, and cost effective and efficient work product.

Although Inspectors do not draft project specifications, which are prepared by the Employer's Engineering Group, and do not negotiate right-of-way agreements, the responsibility of the Employer's Real Estate Group, they are responsible for inspecting contractors' work and meeting with landowners and governmental entities. The Inspectors work the same hours as the contractors' employees, remaining on the jobsite to field questions and respond to issues. Inspectors attend the contractors' morning briefings and ensure that the contractors have the necessary materials to complete their portions of the project. Inspectors ensure that contractors remain on schedule and, on a weekly basis, are responsible for keeping the Employer—typically Manager of Transmission Maintenance Lorimer—updated about the status of their projects.

Inspectors are included in a group of supervisors and representatives who have authority to procure necessary equipment, materials, and supplies up to \$25,000. Inspectors carry procurement cards to purchase single items up to a limit of \$2500 with an overall spending limit of \$7500.

IV. ANALYSIS

A. Inspector's Managerial Status

The National Labor Relations Act neither defines managerial employees nor speaks to whether they are excluded from the Act's coverage. Nevertheless, the Board holds that managerial employees are not afforded Section 7 rights. See, e.g., *Eastern Camera & Photo Corp.*, 140 NLRB 569, 572 (1963). The party contending that an individual's status as a manager warrants his or her exclusion from a petitioned-for unit bears the burden of establishing managerial status. See *Montefiore Hospital & Medical Center*, 261 NLRB 569, 572 fn. 17 (1982).

Managerial employees include only those employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 85 LRRM 2945 (1974). "Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management," by "taking or recommending discretionary actions that effectively control or implement employer policy." *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980) (citations omitted).

Citing *Atlanta Gas Light Co.*, 158 NLRB 311 (1966), the Employer contends that Inspectors are managerial employees who inspect contractors' work to ensure that the Employer's expensive transmission projects are completed in a timely manner, the work is completed in accordance with specifications, and within budget. The Employer notes that Inspectors enforce compliance with the Employer's safety standards; meet with landowners and governmental entities; and have authorization to procure necessary supplies and materials.

Undoubtedly, as detailed above, Inspectors have substantial authority to act as the Employer's primary representative on the projects that they oversee. Nevertheless, the record does not support the Employer's contention that their responsibilities and duties include the authority to take or recommend "discretionary actions that effectively control or implement employer policy." *Yeshiva University*, supra. Although seemingly analogous to the facts of the case, *Atlanta Gas Light* does not warrant the conclusion that the Inspectors are managerial employees. Rather than holding that the contract-inspectors were managerial employees, the Board simply found that they shared a greater community of interest with management rather than the petitioned-for unit. Regardless of whether the involved Inspectors share a community of interest with other employees, the Inspectors' responsibilities do not evince managerial authority.

It is clear that ensuring compliance with the Employer's project specifications is one of an Inspector's primary responsibilities. Accepting or rejecting contractors' work is not evidence of managerial status, however, if it is limited by established policies. See *Dow Chemical Co.*, 237 NLRB 1276, 1277 (1978). In this case, the Employer charges Inspectors with setting daily priorities and ensuring that contractors adhere to the Employer's construction schedule. Nevertheless, the schedules and specifications that contractors follow are not drafted or negotiated by the Inspectors. The record reveals that, if an Inspector deems that a contractor has failed to meet the Employer's specifications, his authority is limited to attempting to resolve the issue with either the contractor's foreman or the project foreman. If an Inspector is unable to resolve an issue at the jobsite, his only recourse is to notify Transmission Maintenance Manager Lorimer.

The Inspectors' authority to inspect contractors' work seems to be similar to that of the inspectors found to be non-managerial employees in *Bechtel, Inc.*, 225 NLRB 197, 197-198

(1976). In *Bechtel*, the inspectors were authorized to inspect contractors' work on large and expensive projects; they met with foremen about work corrections; they had authority to halt construction if specifications were not met; and they could request the removal of an employee from a project. Notwithstanding the inspectors' authority, the Board determined that they were not managerial employees, reasoning as follows:

The record reveals the inspectors' decisions to accept or reject a contractor's work product are predicated upon written specifications. In essence, these specifications are preexisting standards which provide the sole basis for comparing and ultimately judging the acceptability of the contractor's work. Thus, the judgments and decisions made by the inspectors appear to be primarily technical in nature and limited by preexisting established policy. *Id.* at 198.

In this case, it is clear that Inspectors maintain some discretion to authorize a contractor's deviation from the Employer's established specifications. As several witnesses explained, not every contingency can be reflected in the contract specifications prepared by the Engineering Department. Nevertheless, as the Board has held, "[t]he performance of duties under little supervision and involving the exercise of considerable discretion does not necessarily indicate managerial status." *American Federation of Labor*, 120 NLRB 969, 973 (1958). In this case, it is apparent that an Inspector's discretion vis-à-vis authorizing deviations from the specifications is limited to, as Transmission Maintenance Manager Lorimer testified, "minor" changes, such as approving the installation of a culvert or moving the location of a gate to permit a contractor's access to the jobsite. The record reflects that Inspectors permit these minor changes and deal with other day-to-day issues based on their technical judgment gained from past experience working for the Employer. Inspectors are not authorized to permit substantial departures from the contract specifications, which must be authorized by the Employer's Engineering Group or their supervisor. Although Inspectors appear to enjoy considerable discretion in establishing

daily objectives, the record fails to establish that they exercise discretion on a scale that demonstrates that they implement or control employer policy.

Likewise, I do not find that the Inspectors' authority to enforce the Employer's safety standards evinces managerial authority. The ability to shut down a project because of a safety concern is not evidence of managerial authority. See *Dow Chemical*, 237 NLRB at 1276. Inspectors do not formulate the Employer's safety policy; they simply enforce it. See *Rockspring Development, Inc.*, 353 NLRB 1041, 1043 (2009) (enforcing an established safety policy not managerial authority). In fact, the record establishes that Inspectors share authority to shut down a job for safety-related concerns with nearly every employee on the job, thus demonstrating that they do not have unique control over the Employer's policy.

Evidence that Inspectors represent the Employer in meetings with governmental entities and landowners also fails to establish that they are managerial employees. "[O]ne is not a managerial employee simply because he 'may represent [his] employer to the public.'" *Iowa Southern Utilities Co.*, 207 NLRB 341, 345 (1973) (citations omitted). See also *American Federation of Labor*, 120 NLRB at 973-974, and cases cited therein. Although Inspectors are often the Employer's only representative on a jobsite, there is no evidence that they independently negotiate agreements with landowners or governmental entities.

Additionally, the record does not establish that Inspectors exercise managerial authority by extending the Employer's credit. The Board will not find individuals to be managerial employees simply because they have discretion to purchase items on their employer's behalf. See *Iowa Southern*, 207 NLRB at 343, 345 (finding evidence that employee occasionally pledged employer's credit in excess of his \$200 limit did not evince managerial authority). To demonstrate managerial authority, individuals must have independent discretion to approve large

transactions or spend substantial portions of their time making purchases for their employer. See *Concepts & Designs, Inc.*, 318 NLRB 948, 957 (1995); *Swift & Co.*, 115 NLRB 752, 753 (1956). The evidence does not indicate that Inspectors have such authority or regularly perform such duties.

It appears that Inspectors theoretically have authority to procure materials and supplies up to \$25,000. Nevertheless, the limited evidence concerning Inspectors' actual purchases fails to establish that inspectors have ever procured materials in an amount that approaches their established limit, and the record indicates that the Inspectors were not even aware that their purchases could exceed the substantially smaller limits of their procurement cards. Although Inspectors may purchase items when it is necessary to replace or replenish materials necessary to keep a project moving, it is not clear how often Inspectors actually procure materials from sources other than the Employer's own internal store. Even assuming that inspectors routinely purchase supplies from outside vendors, such purchases would appear to be an incidental part of an Inspector's responsibility for monitoring supplies. Under such circumstances, the ability to procure materials and supplies is not indicative of managerial authority. See *Sampson Steel & Supply*, 289 NLRB 481, 482 (1988). This conclusion is not changed by the fact that Inspectors testified that they occasionally make non-routine purchases, such as procuring grass seed to mollify a complaining landowner or designating gravel for placement in an eroded entryway. Although such purchases indicate some independent discretion, they do not connote managerial authority.

For the reasons set forth above, I conclude that the Inspectors do not exercise managerial authority. Whether viewed independently or in conjunction, the Inspectors' various functions

and responsibilities are limited by predetermined guidelines to such an extent that the Inspectors do not effectively control or implement the Employer's policies.

B. Conflict of Interest

The Employer argues that, even if Inspectors are not managerial employees, their inclusion in a union that also represents many of the employees whose work they oversee will create an untenable conflict of interest that will prevent them from successfully performing their jobs. The Board has rejected similar arguments where the alleged managerial employees inspect work subject to predetermined specifications and subject to supervision. See, e.g., *Bechtel*, 225 NLRB at 198. As previously stated, I find that the Inspectors' discretion vis-à-vis inspecting contractors' work is limited by project specifications and that the Inspectors are expected to seek guidance from their supervisor for all but minor contingencies. Although Inspectors maintain some discretion on the jobsite, they are not free to disregard the substandard performance of a contractor or its employees, as they must still answer to their supervisor. Accordingly, I conclude that the facts do not warrant the conclusion that there are conflict-of-interest considerations that preclude the inclusion of the Inspectors in a bargaining unit represented by the Petitioner.

C. Absence of Community of Interest With Existing Bargaining Unit

The Petition, on its face, appears to seek representation of a stand-alone unit of Inspectors. Nevertheless, during the hearing in this matter, the Petitioner adopted the position that it would prefer to represent the Inspectors as part of the existing bargaining unit currently recognized by the Employer. Although the Employer contends that the Inspectors do not share a community of interest with employees in the existing unit, it also maintains that, if the Inspectors are not managerial employees, they should be allowed to vote for inclusion in the existing unit.

The Board enjoys broad discretion to determine the appropriate bargaining unit. See *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950). A petitioner's desired unit is a relevant consideration, though not dispositive. See *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964). If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has discretion to select an appropriate unit that is different than the units proposed. See *Boeing Co.*, 337 NLRB 152, 153 (2001).

The parties' preference for including the Inspectors in the existing unit seemingly warrants treating the Petition as having been amended to reflect their preference. Nevertheless, I am constrained by the fact that the record fails to establish that the Inspectors share a community of duties and interests with employees in the existing bargaining unit.

In determining whether a group of employees possess a community of interest, the Board examines such factors as: (1) functional integration; (2) frequency of contact with other employees; (3) interchange with other employees; (4) degree of skill and common functions; (5) commonality of wages, hours, and other working conditions; and (6) shared supervision. See *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024 (2004).

In this case, the preponderance of the evidence adduced at the hearing demonstrates that Inspectors do not share a community of interest with the existing unit. Although Inspectors are paid on an hourly basis and receive overtime compensation like employees in the existing unit, the similarities appear to end there. As noted above, I concur with the Employer's assessment that the facts of this case are analogous to *Atlanta Gas Light Co.*, supra, wherein the Board concluded that contractor-inspectors did not share a community of interest with a unit of all distribution and service employees. Like the contract-inspectors in *Atlanta Gas Light*, Inspectors have little, if any, contact with unit employees, and their duties pertain solely to work performed

by independent contractor's employees. See *id.* at 312. Furthermore, Inspectors are separately supervised, and there is no evidence of interchange between the Inspectors and unit employees.

Having found that the record fails to establish that the Inspectors share a community of interest with the existing unit employees, and considering the Petitioner's willingness to represent the Inspectors in a stand-alone unit, I will direct an election in the petitioned-for unit. I will leave it to the parties to decide, if necessary, whether it is prudent to negotiate the Inspectors terms and conditions of employment in coordination with those of the employees in the existing bargaining unit.

V. CONCLUSION

I find that the petitioned-for unit consisting of Transmission/Distribution Contract Inspectors employed by the Employer is an appropriate unit for collective bargaining. The record fails to establish that Inspectors are managerial employees or that directing an election in this matter will create a conflict of interest.

VI. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In

addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 304 AFL-CIO.**

VII. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VIII. LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that **two** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The list must be of sufficiently large type to be clearly legible. The undersigned shall make this list available to all parties to the election.

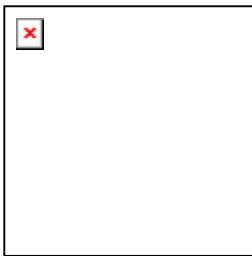
In order to be timely filed, such list must be received in Region 17's Office, Suite 100, 8600 Farley, Overland Park, Kansas 66212, on or before **November 19, 2010**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of two copies, unless the list is to be submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized. If you have questions, please contact the Regional Office.

IX. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m. (ET) on **November 26, 2010**.

This request may be filed electronically through E-Gov on the Agency's website, www.nlr.gov, but may not be filed by facsimile. Refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in filing electronically. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the website, select the E-Gov tab and click E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file documents electronically will be displayed.

SIGNED at Overland Park, Kansas, this 12th day of November 2010.



/s/ Daniel L. Hubbel

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